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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 837

THE UNITED STATES, PETITIONER

v.

JEFF W. MOORMAN AND JAMES C. MOORMAN, CO-PARTNERS, DOING BUSINESS AS J. W. MOORMAN & SON

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on March 7, 1949.

OPINION BELOW

The opinion of the Court of Claims (R. 36-42) is reported at 82 F. Supp. 1010.

JURISDICTION

The judgment of the Court of Claims was entered on March 7, 1949 (R. 42). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims may, in the absence of any finding or suggestion of bad faith or gross error, substitute its own judgment with respect to work required to be performed under a government construction contract for that of the head of the contracting agency, despite a specific contractual agreement, consented to by the complaining contractor, that the administrative decision on this issue "shall be final and binding upon the parties to the contract."

CONTRACT PROVISIONS INVOLVED

ARTICLE 15 of the contract provides:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 2-03 (e) of the specifications provides:

> *Conflicts—*
>
> (1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

(2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern.

Paragraph 2-16 of the specifications provides:

Claims, Protests and Appeals.

(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the

records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

(b) All appeals from decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract.

STATEMENT

Respondent partnership entered into a contract with the United States for the grading of the site of the Oklahoma City Aircraft Assembly Plant (R. 24). During the performance of the contract a dispute arose with respect to whether the grading of a taxiway to an adjacent air depot was called for by the contract (R. 24-25). The contractor performed the work at the contracting officer's direction, but sought additional compensation on the ground that it was not covered by the contract (R. 29-30). After unsuccessfully invoking the machinery which the contract prescribed for the final settlement of disputes, the contractor sued for additional compensation in the Court of Claims and recovered a judgment in the amount of $105,502.17 (R. 31, 33, 42).

Invitations for bids for the grading contract were sent to prospective bidders, including plain-

tiff, on March 26, 1942 (R. 25). Plaintiff's bid of 24¢ per cubic yard for an estimated quantity of one million cubic yards was accepted (R. 28). A "letter contract" was accepted by plaintiff on April 7, and about June 1, 1942, a formal contract effective as of April 3, 1942, was executed (R. 28).

In all respects pertinent here the formal contract followed the form of United States Standard Form 23 Revised, which contained the standard Article 15 provision for the administrative determination of all disputes concerning questions of fact (R. 28). *Supra*, p. 2. Paragraph 2-16 of the specifications added by the War Department contained the usual provision with reference to "Claims, Protests and Appeals" making final and binding upon the contracting parties the decision of the Secretary of War or his duly authorized representative upon protests with respect to the work required by the contract (R. 28-29, 10). *Supra*, pp. 3-4.

Upon being required to perform the grading of the taxiway in question, plaintiff claimed it was not called for by the contract and submitted its protest under Article 15 of the contract and paragraph 2-16 of the specifications (R. 29-30). Plaintiff claimed 84¢ per cubic yard for this grading work instead of the 24¢ per cubic yard allowed under the contract (R. 30). The contracting officer held that grading of the taxiway was within the requirements of the contract and that the contract unit price provided just compensation for

the work performed (R. 32). Accordingly, he denied the request for additional compensation (R. 32).

The contracting officer's conclusions were based upon the following recitals of fact which appeared in his opinion (R. 31-32): At the time the drawings for the contract were being prepared, it was known by all concerned that a taxiway was to be constructed and, although the exact location had not been determined, that it would be located near the boundaries of the air depot and the adjoining assembly plant (R. 31). The specifications for grading the assembly plant site provided for the grading of taxiways, and prospective bidders were informed of the approximate location of the taxiway area by a designation on the drawings of the "Taxiway Proposed" which later proved to be its actual location (R. 31). The drawings furnished with the invitation for bids showed the Taxiway Proposed with the red pencil notation "Taxiway Grading Included in Grading Plant Site" (R. 31). Although the drawings furnished with the formal contract did not bear the red pencil markings, the contracting officer found that the specifications and drawings clearly showed that the work under the contract included the taxiway in question (R. 32).

Plaintiff appealed to the Secretary of War from the denial of this claim and another claim (not involved here) based on work it was required to perform with respect to the grading of an indus-

trial road within the air depot area (R. 32-33). These claims were referred to the War Department Board of Contract Appeals which upheld the contracting officer's decision relating to the taxiway but reversed with respect to the industrial road (R. 33, 34). Without relying upon the red pencil markings on the drawings (to which the contracting officer had referred), the Board's opinion, adverting to the fact that both the specifications and the drawings used the word "taxiways" or "Taxiway (proposed)," stated "there is no escape from the conclusion that the grading contemplated by the contract includes grading of the taxiway" and "there is no question about the fact that the contract was signed with these provisions and this plan as a part thereof" (R. 33-34).[1]

Without suggesting that the decisions of the contracting officer and the Board (the Secretary of War's designee) were in bad faith or grossly erroneous, the Court of Claims reached its own conclusion that they "cannot be sustained under the facts and the specifications and drawings" (R. 37). The Court of Claims refused to give effect to paragraph 2-16 of the specifications, providing that the Secretary of War's decision with respect to the work required by the contract was final and conclusive, on the ground that this para-

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[1] The Board of Contract Appeals' decision (BCA No. 167, January 21, 1944) is reported at 2 Contract Cases Federal (Commerce Clearing House) 178.

graph must be read in connection with Article 15 which was limited to questions of fact (R. 39-40). The decision of the Board of Contract Appeals acting for the Secretary of War was held to be based upon an interpretation of the contract documents and not a question of fact within the meaning of Article 15, and accordingly not binding in any way on the contractor or the court (R. 41).

The court's judgment allowed the plaintiff 59.3¢ per cubic yard for the work performed in grading the taxiway and awarded a judgment in the amount of $105,502.17 as the sum owing in addition to the 24¢ per cubic yard previously paid (R. 41-42).

REASONS FOR GRANTING THE WRIT

1. The dispute arose in the instant case because the contractor considered work demanded of him to be outside the requirements of the contract. Paragraph 2-16 of the specifications, which are expressly incorporated in the contract by Article I (R. 1-2), provides that "If the contractor considers any work demanded of him to be outside the requirements of the contract" he shall protest to the contracting officer. If not satisfied with the decision of the contracting officer, the contractor may appeal to the Secretary of War "whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract." *Supra*, p. 3. In making its own determination of the work required by the contract plans and specifications, the Court of Claims has substituted

its judgment for that of the Secretary of War to whom the final decision of this precise question had been specifically committed by the unambiguous provisions of the specifications.

In failing to give effect to these contract provisions, the decision presents a square conflict with the applicable decisions of this Court. *United States* v. *McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Plumley* v. *United States*, 226 U. S. 545, 547; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553-554; *Kihlberg* v. *United States*, 97 U. S. 398, 402. The holding represents another in a series of recent decisions requiring corrective action by this Court in which the Court of Claims has refused to apply the established provisions of government contruction contracts for the administrative settlement of designated disputes. *United States* v. *Callahan-Walker Constr. Co.*, 317 U. S. 56; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Beuttas*, 324 U. S. 768; *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234. This Court's decisions have long settled that such provisions are proper, and that determinations made by the designated administrative officials are conclusive on the parties, except for bad faith or errors so gross as to lead to that implication.

The instant case is virtually on all fours with *United States* v. *McShain, Inc.*, *supra*, in which the Court of Claims refused to give finality, as required by the specifications, to the contracting officer's in-

terpretation of the material called for by the specifications on the ground that the parties could only stipulate to the finality of determinations of fact. This Court reversed the decision of the Court of Claims *per curiam* and without opinion. The considerations which prompted the Court's decision in the *McShain* case would seem more forcibly applicable here in view of the elimination by that decision of any possible doubt of the applicable rule.[2]

2. There is no valid basis for removing the present case from the rule of these controlling decisions. There is not a suggestion, much less a finding, that the decision of the contracting officer, affirmed by the Board of Contract Appeals, was the result of bad faith or gross error. Likewise, there is no doubt that the decision overruled by the court below dealt with a subject specifically committed by the contract for final and conclusive administrative decision. And the reasons assigned by the Court of Claims for refusing to give final and conclusive effect to this decision are wholly without merit.

The court reasoned that since Article 15 of the contract limited disputes subject to final administrative settlement to questions of fact, paragraph 2-16 of the specifications must be read with the same limitation. When read in this light, the court

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[2] Article 15 ("Disputes") in the *McShain* case was not limited to questions of fact. This is not a significant difference since our reliance here, as in *McShain*, is not on Article 15 but on the pertinent paragraph in the specifications quoted above, which is not limited to questions of fact.

ncluded, it does not extend to the determination non-factual disputes with respect to the work quired by the contract. But the specific language paragraph 2-16 cannot reasonably be interpreted this fashion because it is apparent that all dis-tes relating to the scope of work required by the ntract must involve questions of interpretation the contract documents, similar to those involved re. To read the clause in this manner, therefore, to read it out of the contract. Clearly, this is t a valid basis for rejecting the administrative cision unless, perhaps, the clause itself be deemed id.

The court below was of the view, however, that construed to extend to the dispute in issue, para-aph 2-16 would be invalid because it would be consistent with Article 15, and the contracting icials have no authority to depart from the terms the standard form contracts. Neither of these ints can stand analysis. There is no inconsis-ncy with Article 15 because Article 15 explicitly ntemplates other contract provisions relating to sputes by its opening clause which reads "except otherwise specifically provided in this contract." he specifications containing the provision in-lved here, which the court below recognized "has self come to be a standard provision" (R. 39), are ecifically made a part of the contract by Article (R. 1-2). Moreover, even if an inconsistency be sumed, this would seem authorized by the specific

contract provision that "in case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract." *Supra*, pp. 2-3.

If further authority for paragraph 2-16 is deemed necessary, it can be found in the unrestricted authority conferred upon the War Department (the contracting agency here) during World War II with respect to the form of contract to be used. See Title II of the First War Powers Act (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, 50 U. S. C. App. 611) and Executive Order No. 9001 (3 C. F. R., 1941 Supp., pp. 330-332, December 27, 1941). The statute authorized the President to permit the war agencies "to enter into contracts * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts," and the Executive Order delegated this power to the War Department, expressly authorizing "agreements of all kinds." Thousands upon thousands of war contracts were made which varied or departed from the standard form.[3] It follows that the lower court's views as to the limits of a contracting officer's authority to use the standard government

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[3] The Claims, Protests and Appeals section (*supra*, p. 3) was widely used by the War Department throughout the war. See Anderson, *The Disputes Article in Government Contracts*, (1945) 44 Mich. L. Rev. 211, 214.

contract forms are certainly irrelevant and incorrect as to all wartime agreements entered into by the many agencies endowed with power under Title II of the First War Powers Act. Moreover, even if the contracting officials exceeded their authority in incorporating provisions in a contract, the matter is one for internal governmental correction and confers no rights upon private contractors. See *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75; *United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88. There was, therefore, no reason having any semblance of validity for refusing to apply the contract's unequivocal and unambiguous direction that the Secretary of War's finding was to be final and conclusive.[4]

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[4] An extended discussion of the scope of Article 15, the authority of the War Department's contracting officials to depart from standard form contracts, and the lack of standing of private contractors to complain, in any event, appears in the Government's petition for certiorari in *United States* v. *Pfotzer*, No. 332, this Term, denied December 6, 1948, 335 U. S. 885.

The *Pfotzer* case presented a similar issue—the finality of administrative determination of a question of interpretation of plans and specifications—but, as the brief in opposition consistently stressed, the dispute did not involve any question as to what work was required under the contract, but solely a controversy over the unit of payment for work admittedly called for by the contract and performed by the contractor (see Brief in Opp., No. 332, this Term, pp. 8-9, 9-10, 12, 14, 17, 18). The respondent, in *Pfotzer*, admitted that finality must be accorded to the administrative decision where the matter in dispute is whether certain work is required by the specifications and drawings, and that a refusal by the Court of Claims to follow that fundamental principle would warrant review here, but it argued that no such case was presented by

3. The Government is not seeking review merely to correct an erroneous decision of the court below. The instant case represents the continuation of a tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions which have specifically been committed to their determination by explicit contract provisions. Notwithstanding the *McShain* decision and the subsequent decisions of this Court as late as *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234, the Court of Claims has continued to substitute its judgment for that of officials designated by contract. In addition to the instant case, see *e.g.*, *McGraw and Company* v. *The United States*, Court of Claims No. 47291, decided February 7, 1949; *Pfotzer* v. *The United States*, 111 C. Cls. 184, 224-228, decided May 3, 1948, certiorari denied, 335 U. S. 885.[5] These recent decisions of the court below have again weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under its contracts. They add further doubt and confusion to the authority of designated officers of the United States to make final

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that petition. The instant case, there can be no doubt, does squarely present the very issue said to be absent in the earlier case: i.e., a refusal by the Court of Claims, in the teeth of an explicit contract provision, to follow an administrative determination that certain work was required by the plans and specifications.

[5] The instant case was decided largely on the authority of the *Pfotzer* decision (R. 39, 41). See footnote 4, *supra*, p. 13.

decisions under government contracts. We submit that the power of the Government to make effective contracts of this character should not be so circumscribed except by decision of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1949.

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